

**9.14 CONDEMNATION — PARTIAL TAKING (SEVERANCE DAMAGES)** (Approved 4/96)

**A. Severance Damage**

Although there are several ways of determining just compensation, the *[insert name of party here]* in this case has employed the so-called “before and after” method, in which just compensation is measured by the difference between the fair market value of the entire property on *[insert date of value here]*, immediately before the taking and the fair market value of the remaining property on *[insert date of value here]* immediately after and as affected by the taking.

Where, as here, only a portion of a property is condemned, the measure of just compensation includes both the value of the land actually taken and the value by which the remaining part has been diminished as a consequence of the partial taking.<sup>1</sup>

Therefore in order to arrive at just compensation, first you must determine the before value, that is, the fair market value of the entire property as of *[insert date of value here]* immediately before the taking. Then you must determine the after value, that is, the fair market value of the remaining property as of *[insert date of value here]*, immediately after and as affected by the taking. The difference

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<sup>1</sup>*State v. Silver*, 92 N.J. 507 (1983).

between the before and after value will be the just compensation to the property owner and the amount of your verdict.

Imagine that, before the taking and without any thought of a possible taking of a part of the property, the property owner had put his or her entire property up for sale, found a buyer, and that they finally agreed upon a price on *[insert date of value here]*. During the negotiations, the property owner would have pointed out all the good points of the property that tend to enhance or increase its value. The buyer, on the other hand, would have pointed out things that tend to reduce or decrease its value. Only after discussing all these factors, and taking the time to consider them carefully, would the buyer and the property owner finally have agreed upon a figure. That figure is the property's fair market value before the taking and the first step in arriving at your verdict.

Then, as the second step in arriving at your verdict, imagine that the parties negotiated a sale of what would be left after the taking. The parties have referred to the part that was left after the taking as “the remainder.” Now imagine that the property owner had put the property remaining after the taking up for sale, found a buyer, and that they finally agreed upon a price on *[insert date of value here]*. During the negotiations, the property owner would have pointed out all the good points of the property that tend to enhance or increase its value. The buyer, on the

other hand, would have pointed out things that tend to reduce or decrease its value, including the effects, if any, of the taking. Only after discussing all these factors, and taking the time to consider them carefully, would the buyer and the property owner finally have agreed upon a figure. That figure is the property's fair market value after the taking, the second amount you have to determine in reaching your verdict.

Your verdict of just compensation is the difference between the value of the property before the taking and the value of the property after the taking.<sup>2</sup>

**B. Loss of Street Access**

1. When *[insert name of condemning authority here]* takes only part of an owner's property, there may be special valuation problems if you find that the taking reduced the value of the owner's remaining property. If the partial taking did not reduce the value of the owner's remaining property, then *[insert name of property owner(s) here]* would be justly and fully compensated by being paid the value of the property taken. On the other hand, if the remaining property was lowered in value by the taking, the owner will not be made whole merely by

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<sup>2</sup>*State v. Carroll*, 123 N.J. 308 (1991).

payment of the market value of the portion of property taken. If the remaining property was lowered in value by the taking, the owner must be compensated for the loss sustained to the value of the remaining property. We call such a loss “severance” damages.

Put another way, the owner would not have been willing to sell only a portion of his or her property without including in the sale price the loss in value caused by breaking up his or her property.<sup>3</sup>

There are two ways to include severance damages in your verdict. One is to compare the fair market value of the owner's whole piece of property before the taking with the fair market value of what he or she is left with after the taking. The difference would be the total value of what was taken and that would include severance damages.<sup>4</sup> The other way is to find the fair market value of just the parcel taken and then consider whether the taking resulted in reducing the value of what was left. If you find that the value of the remainder has been reduced — that is, suffered severance damages — these damages should be added to the value of

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<sup>3</sup>*State v. Rohrer*, 145 N.J. Super. 63, 70 (Law Div. 1976); *Sterner v. Nixon*, 116 N.J.L. 418 (E. & A. 1938).

<sup>4</sup>*Port of New York Auth. v. Howell*, 59 N.J. Super. 343, 348 (Law Div. 1960), *aff'd* 68 N.J. Super. 559 (App. Div. 1961), *certif. den.* 36 N.J. 144.

the parcel taken to arrive at a verdict of just compensation.<sup>5</sup>

Whichever way you approach the question, you will have to determine first whether there has in fact been a reduction in the value of the portion of the property not taken, because not all partial takings cause severance damage to the owner of the remainder.

Take as an example a supermarket. The building itself occupies part of the property and the rest is a parking lot. The entire property is devoted to use as a marketplace including the parking lot which attracts customers who use cars to get there and to take home their purchases. If the land used for the parking lot is taken away from the entire parcel, the remaining land and building would be reduced in its utility. The remainder would probably be worth a good deal less than it was with the parking lot. In that case, there would be damages.

*You* must decide, after weighing the evidence, if taking part of the owner's property caused damage to the part not taken. Was the entire property before the taking a functional unit? You should note that the property could be a functional unit even if the parcel taken was physically separate from the parcel not taken. A supermarket's parking lot could be across the street or even several doors away

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<sup>5</sup>*State v. Silver*, 92 N.J. 507, 514, (1983); see also *Village of South Orange v. Alden Corp.*, 71 N.J. 362, 367-368 (1976).

from the store. The test is whether the remaining parcel and the parcel that was taken were or could reasonably be anticipated to be parts of a single economic unit.<sup>6</sup>

2. Quite apart from any damage a partial taking may cause the owner's remaining property, the remaining property may be damaged by the use to which the condemning authority may put the portion that was taken. For instance, a condemning authority might take part of a farm and thereby do no damage to the portion not taken until the condemning authority uses the portion taken for an incinerator which causes smoke and ashes to settle on the remaining portion, ruining the owner's crops. In such a case, the value of the remaining portion would be lower and that reduction in value should be included in your verdict. You are not to separately evaluate the loss caused by the condemning authority's use - in the example given, that would be the destruction of crops every year. Rather you must determine the reduced market value of the remaining property caused by the harmful effects of the condemning authority's use of the property taken.

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<sup>6</sup>*Housing Auth. of Newark v. Norfolk Realty Co.*, 71 N.J. 314, 321-22 (1976); *State v. Bakers Basin Realty Co.*, 138 N.J. Super. 33 (App. Div. 1975), *aff'd* 74 N.J. 103 (1977). *See also*, *Manalapan Tp. V. Genovese*, 187 N.J. Super. 516, 523-24 (App. Div. 1983) (A leasehold interest is not sufficient to create a single economic unit).

When we speak of “value” as a measure of just compensation, we are referring to market value; and when we speak of market value we mean the price which would be mutually agreeable to a willing buyer and a willing seller, neither being under compulsion to act. In making a determination as to value, then, all the considerations which would influence a willing buyer and a willing seller in coming to terms as to price should be considered by you.<sup>7</sup>

**[Insert the contentions of the parties regarding consequential damages here.]**

**C. Consequential Damages**

Every owner of property which abuts a public roadway such as *[insert description of property in question here]* has a right of reasonable access to the general system of streets and highways in New Jersey, but not to a particular means of access. The right of access is subject to regulation for the purpose of protecting the public health, safety and welfare. The property owner’s right of access to abutting roadways is subordinate to the public's right and interest in a safe and efficient highway.

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<sup>7</sup>*Village of South Orange v. Alden Corp.*, 71 N.J. 362, 367-68 (1978).

On the other hand, governmental entities may not eliminate all access to the general system of streets and highways without providing just compensation.<sup>8</sup>

Damages may arise where, after the taking, the owner's remaining portion no longer has suitable access to a street or highway. If you find that the remaining portion has no reasonable access to a street or highway because of the taking that would reduce its value. The cost of correcting the situation by acquiring or building a new access to the street or highway would be an important factor in arriving at the fair market value of the property taken.

Before including such damages in your verdict, however, you must be satisfied that the remaining property has no reasonable access to the street. If access is merely more roundabout or less convenient, that would not warrant any severance damages on account of the loss of suitable street access.<sup>9</sup>

**[Insert the contentions of the parties regarding initial access, access restriction(s) imposed by condemning authority and remaining access.]**

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<sup>8</sup>*N.J.S.A. 27:7-90(e) - (g)*. See also *Highway Horizons Dev. v. Dept. of Transp.*, 120 N.J. 40, 48-49 (1990) in which the Supreme Court recognized that the State Highway Access Management Act, *N.J.S.A. 27:7-89 et seq.* confirms common law access principles, and *Magliochetti v. State*, 276 N.J. Super. 361 (Law Div. 1994).

<sup>9</sup>*But see, State v. Van Nortwick*, 287 N.J. Super. 59 (App. Div. 1995) (Compensation for limitation of access which creates on-site problems may be appropriate if a reasonable buyer or seller would consider such limitation a factor in determining the fair market value of the property).

If you find that the property retains reasonable access after the taking, you may not compensate the property owner for the change in access.<sup>10</sup> If you find that the property does not retain reasonable access, you may provide compensation for its loss.

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<sup>10</sup>Nevertheless, a property owner is entitled to “on-site damages” caused by a diminution of access if they are “actual” and “specific” to the remainder as opposed to resulting from the “limitation of access *per se*”. *State, by Com'r of Transportation v. Van Nortwick*, 260 N.J. Super. 555 (App. Div. 1992); *State v. Van Nortwick*, 287 N.J. Super. 59 (App. Div. 1995).